Supreme Court, U.S.
FILED
DEC 7 1994
OFFICE OF THE CLERK

No. 94-1017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL ADAMS, ET AL.,

Petitioners,

v.

STATE OF MARYLAND
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES, ET AL.,

Respondents.

SUPPLEMENTAL APPENDIX
PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

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APPENDIX 1

APPENDIX H

SUPPLEMENTAL LIST OF PARTIES

A. Those parties listed in the caption of this case.

B. The following are parties and were Grievants in the proceedings at the Office of Administrative Hearings:

1. Martin Salisbury, Employee of the Maryland Department of PI;

2. Albert Jennings, Employee of the Maryland Department of Public Safety & Correctional Services;

3. Walter Payton, Employee of the Maryland State Police;

4. Glendora Gordon, Employee of the Maryland State Department of Public Safety & Correctional Services;

5. Gregory Moore, Employee of the Maryland Correctional Adjustment Center;

6. Jess Defonzo, Employee of the MPRS;

7. Donna Webster, Employee of the Maryland Correctional Institution - Hagerstown;

8. George Drake, Employee of the Roxbury Correctional Instituiton;

9. Sharon Couleter, Employee of the Roxbury Correctional Instituiton;

10. Mary E. White, Employee of the Maryland Correctional Training Center;

11. Joseph Cromer, Employee of the Maryland State Police;

12. Paul Gross, Employee of the Maryland State Police;

13. Craig Lee Sullivan, Employee of the Maryland Correctional Instituiton - Hagerstown;

14. Alice Siegel, Employee of the Maryland State Police;

15. Conway Bailey, Employee of the Maryland House of Corrections;

16. Ronald S. Bridge, Employee of the Maryland Correctional Instituiton - Jessup;

17. Diane J. Bell, Employee of the Maryland State Police;

18. Richard Bohn, Employee of the Maryland Department of Public Safety & Correctional Services;

19. Helen C. Howard, Employee of the Maryland Department of Juvenile Services;

20. John Sippio, Employee of the Maryland Department of Juvenile

Services;

21. Robert C. Kelly, Employee of the Maryland Department of Juvenile Services;

22. Karen Simms, Employee of the Maryland Department of General Services;

23. Clarence Johnson, Employee of the Maryland Department of General Services;

24. John A. Evans; Employee of the Maryland Department of Licensing & Regulation;

25. Victoria Lane, Employee of the Maryland Department of Environment;

26. John C. Reese, Employee of the Maryland Department of General Services;

27. Jeffrey Wachter, Employee of the MCPB;

28. Lillian Owens, Employee of the Maryland Schools for the Deaf;

29. Wylie Campbell, Employee of the Maryland Department of Personnel;

30. Edgar Kaufman, Employee of the MCPB;

31. Patrick E. Miller, Employee of the Maryland Schools for the

Deaf;

32. Lola Steele, Employee of the Maryland Schools for the Deaf;

33. Helen Eisenhardt, Employee of the Maryland Schools for the Deaf;

34. Eugene Caster,, Employee of the Maryland Correctional Institution - Jessup;

35. Richard K. George, Employee of the MCPB;

36. Janet Gaylon, Employee of the Maryland State Police;

37. Geraldine Mendelson, Employee of the Maryland Department of Health & Mental Hygiene;

38. George Leith, Employee of the Maryland Department of Juvenile Services;

39. Harry W. Grove, Employee of the Maryland Department of Juvenile Services;

40. Frank Johnson, Employee of the Maryland Department of Licensing & Regulation;

41. Katherine Murray, Employee of the Maryland Department of Juvenile Services;

42. Christine Siegmann, Employee of the Eastern Correctional

Institution;

43. Berline Dunnock, Employee of the Maryland Department of Juvenile Services;

44. Rosaline Anderson, Employee of the Maryland Department of General Services;

45. Celestine Morgan, Employee of the Maryland Department of Personnel;

46. Eugene Austin, Employee of the Maryland Department of Personnel;

47. Elmer Falconer, Employee of the Maryland Department of Personnel;

48. Michael Adams, Employee of the Maryland PI;

49. William Buettner, Employee of the Maryland PI;

50. Anthony Demma, Employee of the Maryland PI;

51. Leonard Finkelstein, Employee of the Maryland PI;

52. Barbara Hayes, Employee of the Maryland PI;

53. Frederick Moyer, Employee of the Maryland PI;

54. James Orzolek, Employee of the Maryland PI;

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55. Charles Schultz, Employee of the Maryland PI;

56. Donald Seymour, Employee of the Maryland PI;

57. Robert Wooldridge, Employee of the Maryland PI;

58. Richard Youngbar, Employee of the Maryland PI;

59. Howard Younger, Employee of the Maryland PI;

60. Mary Ann Brylske, Employee of the Maryland Department of Public Safety & Correctional Services;

61. Gregory Moore, Employee of the Maryland Correctional Adjustment Center;

62. Christine Siegmann, Employee of the Eastern Correctional Instituiton;

63. Cora McBridge, Employee of the Eastern Correctional Institution;

64. Claudia Nelson, Employee of the Eastern Correctional Institution;

65. Donna Webster, Employee of the Maryland Correctional Institution - Hagerstown;

66. Alice Siegle, Employee of the Maryland State Police;

67. John Witmer, Employee of the Maryland Correctional Training Center;

68. Arthur Ray, Employee of the Maryland Department of Public Safety & Correctional Services;

69. Denise Cheney, Employee of the Maryland Department of Public Safety & Correctional Services;

70. Michael Greise, Employee of the Maryland Department of Juvenile Services;

71. Arthur Femi, Employee of the Maryland Department of Juvenile Services; and

72. Robert Kelley, Employee of the Maryland Department of Juvenile Services.

C. Those parties listed in the caption of this case are Respondents herein.

D. The State of Maryland is a Respondent, along with the Department of Public Safety and Correctional Services, along with all the state agencies for which petitioners were employed as represented by the Maryland Office of the Attorney General.

APPENDIX 8

APPENDIX H

In Re: Job Abolitions

Before Administrative Law Judge Mackel

For the Maryland Office

of Administrative Hearings

MARTIN SALISBURY, ET AL.
91-DOP-PI-11-022554, MCEA
ALBERT JENNINGS, ET AL.
91-DOP-PSCS-11-2476, MCEA
WALTER PAYTON
91-DOP-MSP-11-021091, MCEA
GLENDORA GORDON
91-DOP-PSCS-11-021092, MCEA
GREGORY MORRE, ET AL.
91-DOP-MCAC-11-021265, MCEA
JESS DEFONZO
91-DOP-MPRS-11-021859, MCEA
DONNA WEBSTER
91-DOP-MCIH-11-021268, MCEA
GEORGE DRAKE
91-DOP-RCI-11-021263, MCEA
SHARON COULTER
91-DOP-RCI-11-021254, MCEA
MARY E. WHITE, ET AL.
91-DOP-MCTC-11-024138, MCEA
JOSEPH CROMER
91-DOP-MSP-11-024102, MCEA
PAUL GROSS
91-DOP-MSP-11-024107, MCEA
CRAIG LEE SULLIVAN
91-DOP-MSP-11-024107, MCEA
ALICE SIEGEL
91-DOP-MSP-11-024103, MCEA
CONWAY BAILEY

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91-DOP-MHC-11-021272, AFSCME
RONALD S. BRIDGE
91-DOP-MCIJ-11-021081, AFSCME
DIANE J. BELL
91-DOP-MSP-11-021078, D. LOFTUS, ESQ.
RICHARD BOHN
91-DOP-DPSC-11-021244, IN PROPER PERSON
HELEN C. HOWARD
91-DOP-DJS-11-022589, AFSCME
JOHN SIPPIO
91-DOP-DJS-11-023143, AFSCME
ROBERT C. KELLY, ET AL.
91-DOP-DJS-11-022716, AFSCME
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91-DOP-MCPB-11-021094, IN PROPER PERSON
LILLIAN OWENS
91-DOP-DEFA-11-021083, AFSCME
WYLIE CAMPBELL
91-DOP-DOP-11-025152, AFSCME
EDGAR KAUFMAN, ET AL.
91-DOP-MCPB-11-024284, MCEA
PATRICK E. MILLER, ET AL.
91-DOP-DEAF-11-024186, MCEA
LOLA STEELE
91-DOP-DEAF-11-024190, MCEA
HELEN EISENHARDT
91-DOP-MCIJ-11-023147, MCEA
EUGENE CASTER
91-DOP-MCIJ-11-023147, MCEA
RICHARD K. GEORGE

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91-DOP-MCPB-11-022654, IN PROPER PERSON
JANET GAYLON
91-DOP-MSP-11-021880, L.L. LUCCHI, ESQ.
MENDELSON, GERALDINE
92-DOP-DHMH-11-000520, MCEA
GEORGE LEITH
91-DOP-DJS-11-022694, MCEA
HARRY W. GROVE, ET AL.
91-DOP-DJS-021269, MCEA
FRANK JOHNSON
92-DOP-DLR-11-000747, MCEA
KATHERINE MURRAY
91-DOP-DJS-11-022549, MCEA
CHRISTINE SIEGMANN, ET AL.
92-DOP-ECI-11-000390, MCEA
BERLINE DUNNOCK
91-DOP-DJS-11-022580, MCEA
ROSALIND ANDERSON
91-DOP-DGS-11-021862, IN PROPER PERSON
CELESTINE MORGAN
91-DOP-DOP-000824, L. JOSEY, ESQ.
EUGENE AUSTIN
92-DOP-DOP-000868, J. JOSEY, ESQ.
ELMER FALCONER
92-DOP-11-000861, L. JOSEY, ESQ.

Stephen Awalt, Esq. On behalf of members of MCEA

Jeff Bigelow On behalf of members of AFSCME

Daniel Loftus, Esq. On behalf of Diane J. Bell

Leonard L. Lucchi, Esq. On behalf of Janet Gaylon

Leronia Josey, Esq. On behalf of Celestine Morgan, Eugene Austin and Elmer Falconer

APPENDIX 11

The following employees appeared in proper person:

Richard Bohn
Jeffrey Watcher
Richard George
Rosalind Anderson

Richard George and Jeffrey Watcher adopted the oral argument and memorandum of law presented by Mr. Awalt.

MEMORANDUM ORDER ON MOTION TO DISMISS

The above captioned cases came before the Office of Administrative Hearings as a result of grievances filed by the above named individuals complaining that their positions had been abolished in violation of COMAR 06.01.01.44 and the Merit System Law, MD. ANN. Code, art. 64A. The Grievants requested to be reinstated, made whole and provided all the provisions of the Merit System Law and COMAR 06.01.01.44.

The various State agencies involved in these grievances, through the Attorney

General's Office, filed a Motion to Dismiss pursuant to COMAR 06.01.03.15. Upon receipt of the Motion, the Office of Administrative Hearings identified two preliminary issues that required resolution prior to any hearing on the merits in these matters. Accordingly, these matters were scheduled for oral argument and the various parties were notified of such. Oral argument in these matters was held on January 7, 8, 9, 10, 14 and 17th, 1992. Participating in the presentation of oral argument were:

Marlene Trestman

David R. Durfee, Jr.

Bruce P. Martin

Richard Rosenblatt

Assistant Attorney Generals

On behalf of the Respondent State Agencies

ISSUES

1. Whether the question presented is one within the jurisdiction of the Office of Administrative Hearings; and

2. Whether the Grievants are entitled to rights afforded under the layoff statue, MD. ANN. CODE, art. 64A Section 35.

SUMMARY OF ARGUMENTS

The State, through its various representatives, reiterated and reaffirmed their written Motion to Dismiss and the supporting documentation in these matters. To clarify the State's position, it was outlined that the Motion to Dismiss was based on two assertions. The first is that the Office of Administrative Hearings (OAH) is without jurisdiction over these matters because the complaints are not grievances under Md. ANN. CODE, art. 64A, Section 52(b) (1988) and second, that the layoff provisions of MD. ANN. CODE, art. 64A,

Section 35 (1988) do not apply to positions abolished by operation of law. Elaborating further, the State's representatives asserted that Hopper v. Jones, 178 Md. 429, 13 A.2d 621 (1940) and various Attorney General opinions are dispositive of these matters. Continuing, it was noted that agency participation in identifying positions does not alter the fact that these positions were abolished by operation of law as defined in Hopper, supra. Accordingly, the State asserted that OAH has no jurisdiction and rested on its written memorandum and supporting documents.

Mr. Awalt reiterated and reaffirmed his written response to the State's Motion to Dismiss. Specifically, Mr. Awalt argued that the authority under MD. STATE. FIN. & PROC. CODE ANN. Section 7-213 (1988) is

really not at issue. Mr. Awalt conceded that there was a fiscal crisis and the Governor could abolish positions. He asserted, however, that the cause of complaint was not that positions were abolished but the method employed by the agencies to determine which employees lost their positions. According to Mr. Awalt, MD. ANN. CODE, art. 64A, Section 35 (1988) exists for the exact situation presented by these matters and the various appointing authorities could not ignore its mandate. Mr. Awalt asserted that the Hopper holding is brief and narrow and is certainly not controlling in these matters. Summarizing his positions, Mr. Awalt related that once the Governor, with the approval of the Board of Public Works, abolished positions then the Merit System Law directed the process of selecting which employees

actually lost their jobs.

Mr. Bigelow presented oral argument on behalf of those employees represented by AFSCME. He asserted that the cause of complaint is the arbitrary and capricious decision making process employed by the appointing authorities to determine which employees would lose their jobs. Mr. Bigelow rejected the assertion that the positions were lost by operation of law, stating that such a conclusion requires legislative action which is absent in these matters. He further asserted that Senate Bill (SB) 34 is not consistent with legislative action as defined in Hopper since it (SB 34) did not address abolition of positions but addressed local government and education appropriations. Mr. Bigelow argued that the merit system was designed to prevent what happened in these cases,

that is, political manipulation of public employment. In reference to Conway Bailey, Mr. Bigelow also argued that his rights under the Veteran's Administration Act were violated.

Daniel B. Loftus presented oral argument on behalf of Ms. Diane Bell. He asserted that the Grievant was not challenging the authority to abolish positions but the non-application of the layoff provisions by the appointing authority. Mr. Loftus pointed out that Elmer Tippett, Superintendent of the Maryland State Police, in response to an inquiry from Louis L. Goldstein, stated that he, and he alone, selected which employees were to be terminated. To support this, Mr. Loftus presented the written inquiry from Mr. Goldstein dated October 2, 1991 and Colonel Tippett's

response dated October 7, 1991. Continuing, Mr. Loftus asserted that Senate Bill 34 does not authorize the abandonment of the Merit System Law. He further argued that the Hopper decision is inapplicable to the present situation, since there was no legislative act authorizing the abolishment of Ms. Bell's position.

Mr. Bohn argued that OAH is the only avenue available to State employees to address the issues presented by these grievances. Mr. Bohn asserted that he is entitled to layoff rights since the agency determined which employees were to be terminated. He further noted that although the agency advised him that his termination was due to the elimination of the program, other individuals in his classification and program were not affected.

Mr. Watcher, after adopting Mr.

Awalt's oral and written arguments, stated that OAH has jurisdiction over this matter and that he is entitled to layoff rights.

In reference to the individuals formerly employed at the Department of Personnel, Ms. Josey argued that OAH has jurisdiction since the cause of compliant is based on the actions taken by Secretary Hilda Ford in deciding whom to terminate. According to Ms. Josey, it was Secretary Ford, after receiving input from the various divisions within Personnel, who decided which employees were to be eliminated. Ms. Josey asserted that Secretary Ford exercised total control over who was actually terminated. In reference to the applicability of the Hooper decision, Ms. Josey asserted that that decision is factually inapposite and therefore not controlling. Simply stated,

Ms. Josey contended that unlike Hopper, the terminations in the instant situation were not accomplished by any act of the General Assembly.

Leonard L. Lucchi, on behalf of Janet Gaylon, restated and reaffirmed his written response to the State's Motion to Dismiss. In his argument, Mr. Lucchi acknowledged that the Governor had authority to reduce appropriations by 25 percent. He argued however, that the Governor could not designate which positions should be eliminated or which employees should be terminated. According to Mr. Lucchi, it was left to the individual agencies to implement the budget cuts. Mr. Lucchi also argued that employees should have been given six months' notice before the closure of the Security State Police barracks.

FINDING OF FACTS ON THE MOTION

APPENDIX 21

Mr. Awalt and the State of Maryland by its attorney, the Office of the Attorney General, stipulated to the facts listed below. Although the other Grievants did not affirmatively join this stipulation, after careful review of the record, the stipulated facts are adopted as the facts relative to all of the cases.

1. All of the Grievants were employees of the State of Maryland at the time their jobs were abolished.

2. All Grievants lost their jobs by action of the Board of Public Works dated October 23, 1991 (Ex. I) as attached to the State's Motion to Dismiss.

3. None of the Grievants were given benefit of the layoff rights as defined in MD. ANN. CODE, art. 64A Section 35 (1988) and COMAR 06.01.01.44.

4. All of the documents submitted by

the Grievants and the State are genuine and authentic and admissible to the extent that this forum determines that they are relevant.

DISCUSSION

I. JURISDICTION

MD. STATE GOV'T CODE ANN. Section 9-1601 (1991) designates the Office of Administrative Hearings to adjudicate contested cases regarding certain non-exempted agencies. MD. ANN. CODE, art. 64A, Section 52 (1988) defines grievance as follows:

> (b) "Grievance" means any cause of complaint unless otherwise provided for under this article arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, policies or any other rules, regulations or policies over which

management has control.

In order to determine if an issue presented is one within the jurisdiction of OAH, one needs to address two questions: "Who allegedly did wrong?" and "What was allegedly done wrong?". A basic understanding of the background which led to these contested actions is needed before those questions can be answered.

First, due to an impending fiscal crisis discovered subsequent to the enactment of the budget for fiscal year 1992, the Governor decided to exercise his authority under MD. STATE FIN. & PROC. CODE ANN. Section 7-213 (1988). (Hereafter referred to as Section 7-213). That section provides:

Section 7-213. Reductions.

(a) Authorized. -- Except as provided in subsection (b) of this

section, with the approval of the Board of Public Works, the Governor may reduce, by not more than 25%, any appropriation that the Governor considers unnecessary.

(b) Exclusions. -- (1) The Governor may not reduce an appropriation to the Legislative Branch or the Judicial Branch of the State government.

(2) The Governor may not reduce an appropriation for:

(i) payment of the principal of or interest on the State debt;

(ii) public schools; or

(iii) the salary of a public officer, during the term of office.

(3) Except as provided in the Merit System Law, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassified service. (An. Code 1957, art. 15A, Section 11, 1985, ch. 11, Section 2; 1986; ch. 377.)

On October 23, 1991, the Governor,

with the approval of the Board of Public Works reduced the appropriations of various agencies within the Executive Branch by not more than 25%. Prior to the actions of October 23, 1991, the General Assembly passed 1991 Md. Laws 2771, formally known as Senate Bill No. 34 titled The Budget Reconciliation Act for Fiscal Year 1992. The purpose of the bill was as follows:

> To authorize the Governor for Fiscal Year 1992 to reduce certain appropriations for certain State aid to the counties and Baltimore City; requiring the Fiscal Year 1992 certain local entities to pay for certain local employee retirement and social security costs; providing for the allocation of certain appropriations reductions among the counties and Baltimore City; authorizing the counties and Baltimore City and certain governmental units, subject to certain conditions, to take certain actions to meet their fiscal obligations under this Act: providing that, for a certain period, certain payments under the General Public Assistance Program and the Aid to Families with Dependant Children Program shall be at certain levels; requiring the District Court and

circuit courts to impose an additional court cost on certain criminal defendants in Fiscal Year 1992; prohibiting the court from waiving certain costs unless the defendant establishes indigency; requiring that certain funds be remitted to the Comptroller and credited to the General Fund; authorizing the Commissioner of Correction to deduct certain costs from certain inmate accounts; authorizing the Maryland Legal Services Corporation, for Fiscal Year 1992, to transfer certain funds to the Office of Public Defender to defray operating expenses of the Office; authorizing the State Department of Education in coordination with the Department of Public Safety and Correctional Services to employ, and change the employment status of, teachers and librarians in correctional educational programs on a 10-month per year basis; providing for the effective date of this Act; and generally relating to reconciliation of the State Budget for the 1992 Fiscal Year.

Also prior to the actions of October 23, 1991, the various affected agencies submitted a schedule of positions to be abolished to facilitate the reductions.

Thus, on October 23, 1991 armed with 1991 Md. Laws 2771 (Senate Bill 34) and the

schedule of positions submitted by the various agencies, the Governor with the approval of the Board of Public Works reduced certain appropriations.

Grievants, through their various representatives concede that the Governor could not act under Section 7-213. Most Grievants, albeit reluctantly and basically for the sake of argument, concede that the Governor with the Board of Public Works' approval could, pursuant to Section 7-214, suggest a reduction of the work force assigned to agencies within the Executive Branch.

Some of the Grievants' representatives in their reluctance to concede that the Governor could reduce the work force, place reliance on Section 7-213(b)(3). To counter that argument the State submitted a copy of the Revisor's Note to that

provisions. The Revisor's Note explains:

> In subsection (b)(3) of this section, the reference to an "employee in the classified or unclassified service" is substituted for the former, ambiguous reference to "merit system employees". The substituted language is based on Art. 64A, Section 30(a) of the code, which enables the Secretary of Personnel to increase or decrease pay rates of employees in either service, with the approval of the Governor.
>
> Chapter 11 of the Laws of Maryland 1985, Revisor's Note to S.F. Section 87-213.

Article 64A Section 30(A) (1988) of the Code authorizes the Secretary of Personnel "at any time to increase or decrease any rates of pay for all employees in the classified and in the unclassified services and said increased or decreased rate of pay shall after approval by the Governor apply to all employees in the classification or classifications so affected, including incumbent employees and new employees."

APPENDIX 29

After careful review of Section 7-213(b)(3) in conjunction with Article 64A, Section 30(a), I find the Revisor's Note instructive and the State's position regarding this portion of Grievant's argument persuasive. Section 7-213(b)(3), however, does not prohibit the reduction of appropriation or the reduction of the work force.

In reviewing both the Grievants' oral and written positions, it appears that Grievants are basically not contesting the Governor's action or the approval by the Board of Public Works. The decision that is being disputed, however, is the one made by the various appointing authorities regarding the methodology used to identify the positions to be abolished. Grievants uniformly contend that the appointing authorities had control over who was

selected and that it is this control coupled with non-application of the layoff procedures by the various appointing authorities which forms the basis for their grievances.

The State, on the other hand, contends that it was appropriation reduction pursuant to Section 7-213 which mandated the abolition of jobs. The State's position is that Section 7-213 is not a personnel rule, regulation or policy over which "management" had control. While it is true that the appropriation reduction was predicated on Section 7-213, it is equally apparent that the various agencies, upon request, submitted the information to the Governor identifying which jobs had been selected for abolition. It was this submission of information which dictated which jobs were abolished. The Governor

and the Board of Public Works did not randomly select Position Identification Numbers (PINs) but were supplied that information from the agencies. Since it was that information and that information alone which dictated which positions were abolished, it must be concluded that management exercised control over that decision. Management may not have had control over the fact that such reductions were necessary but they certainly maintained total control over selecting which positions were ultimately abolished.

In light of the above, the response to the question "Who did wrong?" must be "The various appointing authorities." As stated earlier, the Grievants' cause of complaint is aimed directly at the actions of the appointing authorities, not that of the Governor or Board of Public Works.

APPENDIX 32

The next question that must be addressed is "What was allegedly done wrong?" Grievants contend that the appointing authorities failed to comply with MD. ANN. CODE, art. 64A, Section 35 (1988). That section provides in pertinent part:

> Section 35. Laying off employees.
>
> (a) Applicability. -- The provisions of this section that govern the layoff and reinstatement of unclassified employees do to apply to the Board for the injured workers' insurance fund.
>
> (b) In general. -- Employees who are in positions that are to be abolished, discontinued, or vacated, because of a change in departmental organization or a stoppage or lack or work, shall be laid off.
>
> (c) Secretary to establish procedures. -- Except for faculty and other unclassified employees of the State institutions of higher education and their governing boards, the Secretary of Personnel shall establish uniform procedures among State agencies, by rule and regulation,

for:

(1) The layoff of State employees regardless of employment status; and

(2) The reinstatement of laid-off classified and unclassified State employees to comparable occupations positions in State employment.

The State, in its memorandum, contends that the process by which particular positions were selected for abolition is set forth at STATE. FIN. & PROC. CODE ANN. Section 7-103 (1988). That section provides:

Section 7-103. Studies.

(a) In general. -- (1) The Secretary shall continually conduct studies on the needs of units of the Executive Branch of the State government and of private entities to which the State appropriates money.

(2) To obtain the information that the Secretary wants in estimating the needs of the unit or entity, the Secretary may:

(i) question any officer or employee of the unit or entity; and

(ii) examine the records of the unit or entity.

(b) Revenue estimates. -- The Secretary shall:

(1) continually compare the needs of the units of the Executive Branch of the State government and of the private entities with the revenues that are collected;

(2) prepare estimates of revenues that will be available for the State budget;

(3) prepare other estimates of revenues that the Governor requests;

(4) study the revenue structure of the State;

(5) evaluate the sources of State revenues; and

(6) recommend to the Governor:

(i) appropriate changes in the revenue structure of the State; and

(ii) new sources of State revenues.

(c) Recommendations on State units. -- (1) The studies of the units of the Executive Branch of the State government shall include:

(i) program analyses; and

(ii) careful consideration of the administration, organization, functions, and duties of the units, to identify duplication or overlap.

(2) On the basis of the studies, the Secretary shall report to the Governor on changes that the Secretary believes would result in economy or efficiency or otherwise would be in the State's best interest, including:

(i) elimination or reduction of State programs;

(ii) abolition of positions;

(iii) changes in procedures; and

(iv) reorganization or consolidation of units.

(3) The Secretary shall send a

> copy of each report under this subsection to the Director of the Department of Fiscal Services. (An. Code 1957, art. 15A, Sections 17, 18, 22, 23; 1985, ch. 11, Section 2.)

The State's contention is that since this section is not a personnel regulation, there is no grievable complaint.

A review of the scenario of events as depicted by the State does not support the contention that MD. STATE FIN. & PROC. CODE ANN. Section 7-103 (1988) was utilized or that the positions to be abolished were a result of studies performed by the Secretary of Budget and Fiscal Planning pursuant to that section. Instead, the documentation establishes that the appointing authorities, by independent action, selected which positions to abolish. Furthermore, even if Section 7-213 was utilized, no where in that section

nor any other regulation quoted by the State is it even suggested that the layoff provisions of the Merit System Law are inapplicable.

To further support their position that OAH has no jurisdiction, the State cites Briscoe v. Prince George's Co. Health Dept., 323 MD. 439, (1991). The State contends that the above captioned case addresses a similar issues. The issue in the Briscoe case involved a request to amend the State Pay Plan under MD. ANN. CODE, art. 64A Section 27 (1988). The issue in the instant grievance is the non-application of the Merit System Law layoff provisions. There is no dispute that OAH would not have jurisdiction if the issue involved amending the State Pay Plan. However, that is clearly not the issue. The Briscoe case is factually distinctive

from the instant grievance, a distinction that makes the holding in that case inapplicable and of no precedential value to the issue at hand.

A review of the grievances and requested remedies supplies the answer to the question, "What was allegedly done wrong?" The Grievant's complaint is that the appointing authorities failed to apply the layoff provisions of the Merit System law in identifying the positions to be abolished. The layoff provisions outlined in MD. ANN. CODE, art. 64A, Section 35 (1988) are certainly personnel regulations. The decision not to apply the layoff provisions was one exercised solely by the various appointing authorities.

Thus, in light of the foregoing, the issue regarding jurisdiction must be resolved in favor of the Grievants. The

responses to the two questions identified as resolving the issue of jurisdiction establish that this matter is a grievance. The appointing authorities (management) are the alleged wrongdoers and the nonapplication of the layoff provisions (personnel regulations) is the alleged wrongdoing. Accordingly, based on the definition of grievance found in Article 64A, Section 52, this matter is a grievance within the jurisdiction of OAH.

II. APPLICABILITY OF LAYOFF PROVISIONS

Anticipating that it may be concluded that OAH has jurisdiction, the State also argued that the grievances should be dismissed since the Grievants are not entitled to their requested relief. Specifically, the State contends that the layoff provisions do not apply to jobs abolished by operation of law. To support

this contention, the State presents a two-tiered argument, first, that the actions of the Governor and Board of Public Works pursuant to Section 7-213 were legislative in nature and second, because those actions were legislative in nature, Grievants lost their positions by operation of law.

One of the cases cited by the State to support its position that the actions taken in the instant matter were legislative in nature is Mandel v. O'Hara, 320 Dm. 103 (1990). The case is cited by the State in its memorandum as follows;

> In Mandel v. O'Hara, 320 Md. 103 (1990), the Court of Appeals indicated that legislative power could be delegated to an executive agency and that when the agency exercised the power, it would enjoy legislative immunity. 320 Md. at 130.

After careful review and analysis of the Mandel case, a more accurate reading of its holding is that in deciding what type

of immunity applies to a State official's act, one must look at the function at issue, not the office. In Mandel, the Court concluded that the function at issue, vetoing a bill, was legislative in nature and therefore entitled former Governor Mandel to absolute "legislative" immunity.

Using the rationale and analysis outlined by the court in Mandel, a threshold determination in these matters is whether the functions being performed by the Governor and Board of Public Works were legislative or executive in nature. By definition, a legislative act is one which creates a law, while an executive act involves executing the law as it exists, or ministerial functions.

The court decision that the State places great reliance on to support its position that the Governor's and Board of

Public Works' action relative to these grievance was legislative in nature is Hopper, supra. In that case, the Governor proposed a budget which eliminated a specifically identifiable position, that of Mr. Hopper. The General Assembly passed the proposed budget, thereby, eliminating Mr. Hopper's position. The budget then became law. The court held that since the legislature discontinued the appropriation for a specifically identifiable position, the incumbent lost his position by operation of law and was not entitled to the lay off provisions.

In placing its reliance on Hopper, the State compares the acts in Hopper to what occurred in the instant grievances. According to the State the acts of the Governor and Board of Public Works in reducing appropriations were legislative in

nature, as was the budget proposal by the Governor in Hopper. Thus, any positions lost were done so by operation of law.

An understanding of the budget process in Maryland is necessary before any further discussion is undertaken. Maryland has an "executive budget system" which is defined in great detail in Maryland Action for Foster Children, Inc. et al. v. State of Maryland, et al., 279 Md. 133 (1977). That case is only being mentioned as informative regarding the budget process. Basically, in the executive budget system, the Governor has the responsibility to present the legislature with a complete statement of the needs and resources of the State through the budget bill (MD CONST. CODE ANN. Article III, Section 52(3), (4) and (5) (1988). (Hereafter referred presented to the legislature, the bill may be

debated, amended, revised or reduced (MD. CONST., Article III, Section 52(6) and (11). When passed by the General Assembly, the budget bill becomes law without any further action of the Governor. (MD CONST. Article III, Section 52(6)).

There appears to be a no dispute that the Governor is an integral part of the budget formulating process. His actions in formulating the budget, which ultimately becomes law, must certainly be defined as legislative in nature. The question is whether his actions, subsequent to the passage of the budget, are necessarily legislative in nature.

> MD. CONST., Article III, Section 52(13) specifies that:
>
> (13) The General Assembly may, from time to time, enact such laws not inconsistent with this section, as may be necessary and proper to carry out its provisions.

The General Assembly pursuant to the

above quoted section promulgated MD. ANN. CODE, art. 15A, Section 11, the predecessor to MD. STATE FIN. & PROC. CODE ANN, Section 7-213 (1988). Article 15A, Section 11 provided:

> The Governor shall have the power, with the approval of the Board of Public Works, to reduce not more than 25% of any item of appropriation which he may deem unnecessary, except appropriations for the payment of interest and the retirement of State debt, and appropriations to the legislature, the public schools and the judiciary; provided, however, that the salaries of public officers shall not be reduced during their term in office, and the salaries of merit system employees shall not be reduced except in accordance with the provisions of Article 64A of the Annotated Code of Maryland. No department, board, commission, officer or institution shall be authorized to expend any appropriation or part of an appropriation which the Governor shall reduce as hereinabove provided.

Thus, Section 7-213, as did its predecessor, authorizes the Governor to reduce appropriations after the enactment of the budget bill. Such action by the

Governor with the Board of Public Works' approval is not comparable to what occurred in Hopper. In Hopper, the Governor's action or inaction eventually became law. In the instant grievances, the reduction in appropriation did not create or change any laws. Neither is the action an amendment to budget as defined in Section 7-209. Governor with the approval of the Board of Public Works administered a law, Section 7-213. The result was a reduction in appropriations which limited the spending of specified agencies. Such action was a ministerial function, not a legislative act.

Thus, by examining the function being performed by the Governor and Board of Public Works as it relates to Section 7-213, it is clear that such action is executive, not legislative. Accordingly,

any results from exercising that function, such as job abolishment, are not legislative in nature. If the results are not legislative, then it cannot be concluded that the job abolition were by operation of law.

This finding does not "overrule" Hopper nor does it in any manner affect the holding in Hopper. There are some functions performed by the Governor which are legislative in nature, such as budget formulation and vetoing bills, while there are others which are not. The conclusion reached by this discussion is that in the instant grievances, the actions of the Governor with the Board of Public Works approval was executive, not legislative. Thus the jobs were not abolished by operation of law as defined by Hopper, supra.

The State also asserts that the passage of Senate Bill 34 is further proof that the positions were abolished by operation of law. That assertion must fail without further comment since SB 34 does not address the abolition of positions.

Several Attorney General Opinions were cited by the State as support for its positions. The earliest Attorney General Opinion submitted by the State, 64 Op. Att'y Gen. 146 (1979), specifically dealt with the Secretary of Budget and Fiscal Planning's authority and its relation to the grievance procedure which was not as issue in the instant grievances. The next opinion supplied by the State, 65 Op. Att'y Gen 45 (1980), although relating to the predecessor of SF 7-213 and thus informative is of little guidance regarding the applicability of the layoff provisions.

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Ironically, the next two Attorney General Opinions cited by the State are not in accord with each other. In 75 Op. Att'y Gen. No. 90-056 (Dec. 5, 1990), the Attorney General concludes:

> Under SF Section 7-213(a), the Governor, with the approval of the Board of Public Works, "may reduce, by not more than 25%, any appropriation that the Governor considers unnecessary." By this provision, "the General Assembly clearly has given the Governor extremely broad discretion to determine what ...the Governor...believes or considers should be treated as not required under the circumstances." 64 Opinions of the Attorney General 45, 51 (1980). If the Governor, with Board approval, exercised this "extremely broad discretion" to eliminate the funding of a group of positions and coupled the reduction with a budget amendment under SF, Section 7-209(b) to conform the appropriation to the reduction, those positions would be lost "by operation of law" fully as much as the position in Hopper. In the end, there would be no money to pay these employees and that, held the Court of Appeals, is a situation not addressed by Article 64A, Section 35. (emphasis added)

The most recent Attorney General

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Opinion which concludes that positions abolished pursuant to SF Section 7-213 are not entitled to the lay off provisions, 76 Op. Att'y Gen. No. 91-041 (September 5, 1991), does require that such action be coupled with Section 7-209(b). In the most recent Attorney General Opinion it is maintained that the Governor's actions under Section 7-213 alone are sufficient to constitute the operation of law. However, the reasoning in the earlier opinion clearly requires that the action under Section 7-213 must be coupled with Section 7-209 before it can be concluded that the action is by "operation of law". Not only does the latest opinion fail to require action under Section 7-209, it makes no mention whatsoever of that section. Therefore, these two Attorney General Opinions are in apparent conflict and

unpersuasive.

Accordingly, based on the above, the issue regarding applicability of the lay off provisions must be resolved in favor of the Grievants. The positions were not abolished by operation law and therefore, Grievants are entitled to the application of the layoff provisions. Grievants are advised, however, that this conclusion in no way assures reemployment. Full hearings on the merits are necessary to examine Grievants' rights pursuant to MD. ANN. CODE, art. 64A, Section 35 (1988).

CONCLUSIONS OF LAW

The burden of proof regarding the Motion to Dismiss rests with the State, as the moving party. After careful deliberation and based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that:

1. The cause of complaint presented by these grievances is one within the jurisdiction of the Office of Administrative Hearings; and that

2. The Grievants' positions were not abolished by operation of law.

Therefore, Grievants are entitled to rights afforded under the layoff statute, MD. ANN. CODE, art. 64A, Section 35 (1988).

ORDER

It is hereby ORDERED that the Motion to Dismiss, filed by State is DENIED. These matters will, therefore, be scheduled for hearings on the merits.

Date: February 25, 1992 Sondra L. Mackel
Administrative Law Judge